No 2. annualrents, ſo that a Lady tercer could have no right but with the burden thereof. *See* TERCE.

Gosford, MS. p. 34.

1726. *January* 26.

MARQUIS of CLYDESDALE *againſt* EARL of DUNDONALD.

*** This great cauſe conſiſts of various branches. That part of it which regards Baſe Infeftments is diſtinguiſhed by the marginal note oppoſite. The other ſubjects will be referred to in the particular Titles to which they belong. It has been thought beſt to record the whole caſe together, where it firſt occurs.

BRANCH I.

Clause of Return.

No 3. THE eſtate and honours of the family of Dundonald being provided to heirs-male in the year 1716, John Earl of Dundonald having only one ſon, William, the laſt Earl, from whom he had no great expectation of iſſue, executed a deed, by which, 'failing heirs-male of his own body, he obliges himſelf to provide 'and ſecure his eſtate in favour of Lady Anne Cochran his eldeſt daughter, and 'the heirs-male of her body; whom failing, to his other daughters, in their or-'der,' &c. Earl William having died in his minority, without iſſue, the Marquis of Clydeſdale, only ſon to Lady Anne Cochran, brought an action to have it declared, 'That the heirs-male of the ſaid Earl John's body having failed, 'he the Marquis, as heir-male of the ſaid Lady Anne's body, was heir of pro-'viſion to the ſaid Earl his grand-father; and craving that the preſent Earl of 'Dundonald might be decerned to make up his titles to the eſtate, and convey 'the ſame in his favour.' On the other hand, this Earl of Dundonald, the heir-male of the family, brought a counter action of declarator by way of defence; among other concluſions, inſiſting that it might be found, 'That Wil-'liam, firſt Earl of Dundonald having conveyed his eſtate to heirs-male, with a 'clauſe of RETURN to himſelf failing heirs-male, this imported a prohibition to 'alter; and therefore the ſaid Earl John had no power, by a gratuitous deed, to 'alter the conveyances and courſe of ſucceſſion which their anceſtor had eſta-'bliſhed for the preſervation of his name and family.' Theſe conveyances ſtood thus: The ſaid William firſt Earl of Dundonald, by diverſe deeds, in the years 1653, 1656, and 1657, ſettles his eſtate upon 'William Lord Cochran his eldeſt 'ſon, and the heirs-male of his body; whom failing, to return to himſelf.' And in the year 1680, by a procuratory of reſignation; and 1684, in his grand-ſon's contract of marriage, the ſame Earl William, after the deceaſe of this ſon, renews the ſettlement 'in favour of John Lord Cochran his eldeſt grand-ſon, and 'the heirs-male of his body; whom failing, to William Cochran of Kilmaronock, 'his ſecond grand-ſon, (father of Thomas the preſent Earl) and the heirs-male

No 3.

'of his body; whom failing, to his other grand-ſons; whom failing, to himſelf; whom all failing, to the eldeſt heir-female of his own body, without diviſion.'

From theſe deeds it was *pleaded* for the Earl, That where a maker of an entail diveſts himſelf of the fee, and ſubſtitutes himſelf to his own donees; ſuch ſubſtitution being purchaſed at no leſs value than the whole ſubject, is in the ſtricteſt manner onerous, and conſequently unalterable by any of the intermediate ſubſtitutes in prejudice of the maker. If one ſhould give a ſum of money to the maker of a tailzie, to get himſelf put into the ſubſtitution, ſuch ſubſtitution would be onerous and unalterable in prejudice of him who gave the conſideration for it: And is not the intention as ſtrong, when a man gives away his eſtate, with a proviſion of return to himſelf in a certain event, that the ſame ſhould not be arbitrarily diſappointed, as where he had only contributed a ſmall matter for being named a ſubſtitute? To confirm this, *see* 31ſt January 1679, Drummond *contra* Drummond;* 10th December 1685, Mortimer *contra* College of Edinburgh:† In which caſes, though the ſubſtitution was in money, and not in lands, it was found, that the inſtitute could not alter in prejudice of a clauſe of return; and the *ratio decidendi* was purely the oneroſity of the ſubſtitution, which equally applies to all eſtates, whether in land or money. And in a late caſe betwixt the Duke of Douglas and Lockhart of Lee, in a land-conveyance, a return to the tailzier was found to be an onerous ſubſtitution, not to be gratuitouſly altered, *voce* FIAR ABSOLUTE, LIMITED.

It was allowed by the Marquis, That the Lords in ſome caſes have made a diſtinction betwixt a clauſe of return and a ſimple ſubſtitution; that a clauſe of return was ſomething ſtronger, and yet not the ſame with a prohibitory clauſe: But it was *contended*, That the Lords never found this in any caſe where an eſtate was provided to an heir *alioqui ſucceſſurus*; which failing, to other heirs; which failing, to return to the granter, &c. Indeed, where an eſtate is given away to a ſtranger, or one not *alioqui ſucceſſurus*, with a limitation to particular heirs, and a proviſion of return to the granter; this has been explained to have the force of a paction betwixt the granter and the ſtranger receiver of the eſtate, that failing the heirs in the limitation, the eſtate ſhould return to the granter. And this is moſt juſt, becauſe where a proprietor makes ſuch a deed, it is evident he is not ſettling his ſucceſſion, but is giving away his eſtate from his ſucceſſors for a particular uſe; and this reaſonable condition is implied, that *cauſa ceſſante, ceſſabunt effectus*, when that uſe is at an end, that himſelf or his righteous heir ſhall have back the eſtate. And this cannot be better illuſtrated, than from conſideration of the late caſe betwixt the Duke of Douglas and Lockhart of Lee, cited for the other party: There a part of the family eſtate of Douglas, being given away to the heir of a ſecond marriage, and the heirs of his body; which failing, to return to the right heir of the family of Douglas; the Lords did juſtly interpret, 'That that clauſe of return was not a ſimple ſubſtitution, but was of the nature 'of a paction betwixt the family and the heir of the ſecond marriage, that fail-

* Stair, v. 2. p. 686. *voce* FIAR ABSOLUTE, LIMITED.
† Preſident Falconer, No 97. p. 67. *voce* FIAR ABSOLUTE, LIMITED.

No. 3. ' ing him and his heirs, (in ſupport of whom alone the eſtate was given) the ' eſtate ſhould come back to the family:' There is therefore a wide difference betwixt this caſe and every caſe where a man is ſettling his eſtate upon his own heir. In all ſuch caſes, the laſt ſubſtitution being by way of a clauſe of return, there is no conveyance for a certain uſe, no implied condition; it is no more than a common expreſſion, pointing out whom the proprietor intends ſhould be his heir, failing ſuch another; ſtill leaving every ſubſtitute in his full right of property and power of diſpoſal. It is to no purpoſe, therefore, to inſiſt upon the onerosity of ſuch a clauſe of return: There is no queſtion the maker of a tailzie, diſponing his eſtate to his heir *alioqui successurus*, ſince he might retain it to himſelf, can make it return upon what conditions he pleaſes; but where his principal deſign is confeſſedly that only of pointing out the ſucceſſion of his heirs, can any ſecondary intention be drawn from a clauſe of return importing a limited tailzie? The Marquis's lawyers beg leave to ſay, the preſumption lies on the other ſide, ſince the Earl of Dundonald made no uſe of the known irritant and reſolutive clauſes calculated for the reſtriction of property, that he deſigned only a ſimple deſtination, and had no view to limit his ſucceſſors. Taking the matter in this view, the deciſions cited for the Earl will be found nothing to the purpoſe, they being in relation to ſums of money given as proviſions to children, and conſequently grants for a particular uſe; which uſe being at an end, the intention was obvious, that the ſums ſhould ceaſe to be due: So that bonds of this nature are underſtood to be ſo far perſonal, that they go not to gratuitous aſſignees.

It was *urged* in the *second* place for the Marquis upon this head, That whatever effect a clauſe of return may have with regard to the perſons in whoſe favour conceived, it can operate nothing in favour of the intermediate heirs who are called to the ſucceſſion before theſe perſons. Now let it be granted, there was the ſtrongeſt ſecurity in favour of the Earl of Dundonald's heirs whatſoever, what is that to the heirs-male? Is there any thing thereby ſtipulated in their favour? Or is it a tenable point, becauſe the Earl took care to tie down his ſon, and the heirs-male of his body, not to diſpoſe of the eſtate to a ſtranger in prejudice of his heirs of line, that therefore his ſon, or any of the ſubſequent heirs-male, could not better the caſe of the heir of line, and give him the ſucceſſion ſooner than the Earl had ſtipulated? This is the very caſe: The Marquis of Clydeſdale is the heir whatſoever, the very perſon in whoſe favour the return is conceived; how then can it be ſaid, that the deed in his favour is in prejudice of the clauſe of return? And if not in prejudice, how comes the clauſe to be made a foundation upon which to reduce it?

To this it was *replied* for the Earl, ' It is a principle, Wherever a ſubſtitution ' is onerous in favour of the laſt termination, it gives the force of a *fideicomiss.* ' to the whole deſtination.' If which were otherwiſe, this abſurdity would follow, that the ſubſtitute who was made preferable in the ſucceſſion, would have a weaker right than he who was called after him: Beſides, that the matter could not otherwiſe be expedited; for when the gratuitous alienation is made, it is pro-

bable the onerous ſubſtitute may have no title to quarrel it, many being before him in the right of ſucceſſion; and when perhaps after a long tract of time, the ſucceſſion is open to him by the failure of the intermediate ſubſtitutes, they themſelves being all the while out of poſſeſſion, he has but a ſlender lay that this ſhall turn to his account, when in all probability the proviſion of return is quite forgot, or cut off by preſcription in favour of third parties. No 3.

'THE LORDS found, That neither the clauſe of return in the contract 1653 and 1656, nor the ſubſtitution in the procuratory of reſignation 1680, or contract of marriage 1684 years, did diſable the laſt John Earl of Dundonald, gratuitouſly to alter the ſucceſſion by a deed in favour of his daughters, in prejudice of the heir-male of the former inveſtiture.' *See* FIAR ABSOLUTE, LIMITED.

BRANCH II.

Minor.

ANOTHER head of the Earl's declarator was to this purpoſe, that at any rate the deed in the 1716 falls to be ſet aſide, in reſpect that the laſt Earl William, in the 1725, with conſent of curators, made a new deed of ſettlement in favour of the preſent Earl. Againſt which deeds, in the 1725, it was *objected*, That they were done on death-bed, and in minority; either of which was ſufficient to ſet them aſide.

It was *pleaded* for the Marquis, It is a received maxim in our law, that a minor, even with conſent of curators, cannot prejudge his heir, or gratuitouſly alter the ſettlements made by his predeceſſor. Sir George Mackenzie, in this matter, is expreſs in his treatiſe of Tailzies, where he ſays, "It hath been doubted if minors can make tailzies, even with conſent of tutors and curators: And I conceive they cannot; for though it cannot be properly ſaid that they themſelves are leſed, ſeeing they continue ſtill fiars; yet a minor may be juſtly ſaid to be leſed, in that he wrongs his family and neareſt relations.'

In ſupport of the deed, it was *pleaded* for the Earl of Dundonald: It is the known law of Scotland, that a minor with conſent of curators, or by himſelf where he has none, has the ſame power over his eſtate, as if he was of full age; under this ſingle exception, 'unleſs the minor himſelf is leſed by the deed.' The original of the maxim, that a minor cannot prejudge his heir, comes from this, that generally ſpeaking theſe two go together, a leſion to the minor himſelf, and a leſion to his heir and family. Now in the preſent caſe it happens to be quite otherwiſe; Earl John, the minor's father, intended to diſinherit the preſent Earl of Dundonald, while at the ſame time he was his repreſentative both in name and honours; which was the moſt irrational action of that gentleman's life: A deed, which had he been minor when he did it, he could have reduced on the head of leſion, granting it otherwiſe unalterable. Is it not then unreaſonable to maintain, that his ſon, the heir of the family, was leſed by the alteration?

Replied for the Marquis: The pretended favour of conjoining the eſtate and honours alters not the caſe: The ſettlement made by the predeceſſor is preſumed

No 3. in law to be the moſt advantageous for the minor; and it admits no arguments againſt this preſumption. Beſides, there is another reaſon drawn from utility: For be it once introduced, that a minor, to whom the law aſcribes a weakneſs of mind, may alter the deeds of his predeceſſors without a ſufficient onerous cauſe, it will lay him open to ſuch importunities, as may prove highly pernicious to his family; and therefore ſuch importunities it is the common intereſt to guard againſt.

'THE LORDS found, That William laſt Earl of Dundonald could not, in his minority, though with conſent of curators, gratuitouſly make any alteration of the deſtination of ſucceſſion contained in the ſaid bond of tailzie 1716.' *See* MINOR.

BRANCH III.

Death-bed.

IN *answer* to the other objection of death-bed, againſt the deeds made by Earl William in the 1725, and in ſupport of theſe deeds, it was urged for the Earl, It is a principle indeed, That death-bed deeds are not good againſt the heir. But this will not apply to the preſent caſe; in reſpect that neither the Marquis, nor the Ducheſs of Hamilton, his mother, were in any ſenſe heirs to Earl William, whoſe deeds are craved to be reduced, 1*mo*, In that they could not have been ſerved as heirs of proviſion to him; 2*dly*, *Esto* they could, yet an heir of proviſion, who cannot ſerve in the ſubject, is not ſuch an heir as in law is entitled to the privilege of death-bed. To make out the *first* point, Earl John is not obliged, by the bond of entail 1716, to reſign in favour of himſelf, whom failing, in favour of Lady Anne; but he directly obliges himſelf to reſign to Lady Anne. By this clauſe ſhe was ſtated a proper creditor, and by no means heir: There was nothing in the perſon of the granter, which ſhe could carry by a ſervice, in the event the obligation was to take effect; and it is evident, where there is no ſervice, there can be no heir. But then, as to the *second* point, *Esto* Lady Ducheſs could have ſerved heir of proviſion; yet by the original conſtitution of the law of death-bed, and by the records as far back as they are to be found, an heir of proviſion has not this privilege, but ſingly the heir of the inveſtiture, or, in other words, the heir in the ſubject alienated. This is diſtinctly held forth by our learned countryman Craig; who, after he has told us, on the ſubject of death-bed, that *in lecto ægritudinis nemo potest hæredi suo præjudicare*, when he comes to explain who it is that can ſucceed as heir, L. 2. Dieg. 13. § 5. his words are, 'Apud nos, hæres is ſolus eſt, qui in feudum rerum immobilium, aut rei alicujus 'immobilis ſuccedit;' and afterwards, § 25. 'Is proprie hæres non dicitur, niſi 'qui a lege ad ſucceſſionem vocatur; ſunt enim qui non ex lege, ſed ex con-'ventione partium ſuccedunt; ſed hi nomen hæredis non merentur.' And ſurely, as there is no reaſon for extending this law in the general, there is much leſs in this particular caſe: The deed complained of, is a deed altering a former; which former was, in the eye of the law, a leſion prejudicial to the granter and his family: And as the law of death-bed was introduced for preventing impoſitions

and abuſes to the ruin of families, would it not be a moſt irrational deciſion, that the deed of a ſucceſſor, rectifying a ruinous conveyance made by his predeceſſor, ſhould be reduced upon the ſame ground of law, on which the deed itſelf whereby the ruin came could have been reduced? No 3.

Replied for the Marquis, That there is no diſtinction in the law of death-bed, betwixt a right of a perſon that is heir, in virtue of a perſonal deed, and him that is heir by an inveſtiture completed with infeftment. Craig indeed points at a diſtinction; but his opinion on that head has been exploded, and juſtly. The foundation of the law of death-bed was, to prevent perſons being impoſed upon, by the importunities not only of prieſts, but of near relations, at a time when, through weakneſs, they are preſumed not capable of reſiſting ſolicitation, to alter the ſucceſſion in prejudice of thoſe perſons, who, during their firm health, were the true heirs, to whom the eſtate was by law to deſcend, by whatever title, as heirs, whether of line, male, conqueſt, or proviſion; and without diſtinction, whether they were heirs in virtue of a perſonal deed, or a deed on which infeftment followed. And, as this is eſtabliſhed by conſtant practice, it is unneceſſary to take notice of any other deciſion, than what paſſed in the caſe Hepburn of Humby *contra* Hepburn, 25th February 1663*; where there are three points determined, every one of which deſtroys the objection made in this caſe. The *firſt* is, 'That the purſuer of the reduction had a good title, though he had only a 'perſonal proviſion in his favour, conceived in a contract of marriage upon which 'no infeftment had followed:' And the reaſoning there was preciſely the ſame that is now made uſe of for the Earl of Dundonald. 2*do*, It was determined, 'That the law of death-bed did operate in favour of an heir-male, by virtue of 'a perſonal proviſion, even in prejudice of the heir of line, who was heir of the 'inveſtiture:' How much more in favour of the heir of line in prejudice of a collateral heir-male? And 3*tio*, It was determined, 'That though the right of 'the heir-male aroſe only from the deed of the defunct, who had made a diſpoſition in his favour to the excluſion of heirs of line, and had reſerved a power 'to alter; yet that alteration could not be made on death-bed, to the prejudice 'of that very perſon whom the defunct, by his own deed, had created heir.' And if it be ſaid that this caſe was ſettled betwixt the parties, let it be conſidered what Lord Stair takes notice of, That the Lords were moſtly of opinion that theſe points were law in every caſe.

'The Lords found, That William laſt Earl of Dundonald could not, on death-bed, gratuitouſly make any alteration of the deſtination of ſucceſſion, contained in the bond of tailzie 1716.' *See* Death-bed.

BRANCH IV.

Prescription, Baſe Infeftment, *Hæreditas jacens*.

Another head of the Earl of Dundonald's declarator was to this purpoſe, 'That in ſo far as concerned certain parcels of the eſtate, the gratuitous 'deeds of alteration' (under which the Marquis claims) 'muſt be declared

Baſe infeftment is good againſt the granter and

* Stair, v. 1. p. 186. *voce* Death-bed.

No 3. his heirs, tho' neither regiſtered nor clothed with poſſeſſion.

'ineffectual, as granted by perſons who, with reſpect to theſe parcels, were 'only in the ſtate of apparent heirs.' The matter ſtood thus: William, firſt Earl of Dundonald, in his ſon the Lord Cochran's marriage-ſettlement, diſponed to him and the heirs-male of the marriage, the lands of Dundonald, Ochiltree, Cochran, &c. in virtue whereof, the Lord Cochran was infeft in theſe lands. Again, in the year 1656, there was a contract of excambion betwixt the Earl and his ſon, by which his ſon rediſponed to him the lands of Ochiltree; in lieu whereof the Earl diſponed to his ſon, and the heirs-male of his body, &c. the lordſhip of Paiſley and lands of Glen, in virtue whereof the ſon was thereafter infeft. After this there were certain other lands purchaſed by the ſaid Earl William, to himſelf in liferent only, and to the ſaid Lord Cochran, and the heirs-male of his body in fee: And though all theſe ſeveral lands were thus habily veſted by infeftment in the perſon of the ſaid Lord Cochran, and the heirs-male of his body; none of the later Earls, deſcendants of the Lord Cochran's body, made up any title to theſe infeftments: To which, therefore, it was pleaded, That the preſent Earl of Dundonald, as the neareſt heir-male of his body, has the only right.

Objected to this, in the *firſt* place, for the Marquis, That in as much as William the firſt Earl of Dundonald, had, in the year 1680, reſigned the ſaid lands wherein his ſon died infeft, in the hands of the ſuperior, for new infeftment thereof to John Lord Cochran, his grandſon, in virtue whereof he was infeft, and on the footing of which infeftment the family have poſſeſſed downwards to the death of Earl William in the 1725; therefore, any claim the preſent Earl could have, as apparent heir of the infeftments, which ſtood in the perſon of William Lord Cochran, his grandfather, was loſt both by the negative and poſitive preſcription.

Answered for the Earl, 1*mo*, Were there otherwiſe *termini habiles* of preſcription, of which afterwards, it could only commence from the death of the Earl, whoſe liferent was reſerved in the ſeveral conveyances, becauſe the Lord Cochran could not ſooner begin to poſſeſs, without which there can be no poſitive preſcription: Now, he having deceaſed no ſooner than November or December 1685, the forty years had not expired when the preſent Earl brought his action of declarator. 2*do*, As to the negative preſcription, though there had been poſſeſſion from the 1680, ſtill the years of William the firſt, the liferenter, behoved to be deducted; becauſe, while he lived, the preſent Earl, heir of the Lord Cochran's infeftments, was *non valens agere:* And the Lords have found in a courſe of uniform deciſions, that preſcription cannot run againſt the fiar during the life of the liferenter. In the *next* place, there can be no negative preſcription in this caſe, becauſe, as well that title to which the preſcription is aſcribed, as that title under which the preſent Earl claims, were both in the ſame perſon: For as John Lord Cochran was infeft upon the ſettlement 1680, ſo he was apparent heir of his father's infeftment, and poſſeſſed by virtue of both titles; and upon this medium, the argument for the Earl of Dundonald goes yet higher, that no preſcrip-

tion could run but from the death of Earl William laſt deceaſed, who was the apparent heir of the Lord Cochran, and in poſſeſſion of his eſtate. No 3.

Replied: Earl William's lifetime and poſſeſſion can never be deducted to ſtop the poſitive preſcription: For *1mo*, He was infeft in the years 1659 and 1662, publicly in moſt of all the eſtate, by a charter to himſelf and his heirs whatſoever, which was inconſiſtent with the ſettlements in the deeds 1653 and 1656; and therefore it may be, and is contended, that the preſcription began even from the 1662: For, from that time, it was competent to the heirs male to have quarrelled that infeftment made to the heirs whatſoever, and either to have reduced it, or to have obliged Earl William to denude; and ſince that was not done, every purchaſer from the Earl of Dundonald can found upon his poſſeſſion from that time, to complete the preſcription in their favour, and are not concerned to enquire what liferents were given or reſerved by former ſettlements: There is a charter and ſaſine abſolute, which is all the act of Parliament requires; and now there is a poſſeſſion of ſixty years in conſequence of it. In the *next* place, Suppoſing the poſſeſſion did only commence from the 1680, the years of the liferent are not to be deducted, becauſe the fiar and liferenter, both of them, poſſeſſed upon the footing of the new conveyance, the public infeftment that reſerved Earl William's liferent; ſo that in place of his poſſeſſion being deducted, it expreſsly accreſces to the conveyance 1680, as being in virtue of the ſame infeftment: In this caſe, the poſſeſſion of the liferenter is plainly the poſſeſſion of the fiar. As to the *ſecond* part of the anſwer, That the Earl was *non valens agere*: *1mo*, By the act of Parliament, this ſeems to be no objection to the poſitive preſcription; otherwiſe the records can give no ſecurity. Perſons can ſee who are infeft, and who in poſſeſſion; but they never can know who are *non valentes agere*: And indeed the objection ſeems to be competent by our law, againſt the negative preſcription only. But *next*, the maxim is entirely misapplied; for if it be not, there can never be a preſcription: Any heir ſtarting up at the end of a hundred years, was, in this ſenſe, *non valens agere*; the ſucceſſion was not devolved on him; the fault was his predeceſſor's, and not his; and non-exiſtence would for ſure be the ſtrongeſt incapacity that could debar any heir. But this is not the meaning of the law: The incapacity muſt lie upon the perſon to whom the right does or might belong, during the courſe of the forty years; and therefore, if theſe perſons to whom the right belonged during that time, were in a capacity to have interrupted the preſcription, there is no place for the maxim. In this caſe, all the Earls of Dundonald from the 1680, were in a capacity to have interrupted. It is true, they choſe not to do it; and ſo much the ſtronger is the preſcription, when it is fortified by an expreſs conſent, as well as by a negligence or inactivity for ſo many years.

Objected for the Marquis, in the *ſecond* place, to this head of the Earl's declarator: That William Lord Cochran's infeftment, in the Lordſhip of Paiſley, was only a baſe infeftment, holden of his father the granter, not clad with poſſeſſion, which was null by the law at the time; and therefore the poſterior infeftment,

No 3. upon the ſurrender of the ſame granter, in the year 1680, is the preferable right to the lands of Dundonald and Cochran, contained in the ſettlements 1653, and to the Lordſhip of Paiſley, contained in the ſettlement 1656.

Answered, 1*mo*, That it was no nullity in baſe infeftments, not to be clad with poſſeſſion: For even before the ſtatute 1693, they were to all effects valid rights, excepting only in competition with poſterior onerous public infeftments, or ſuch baſe ones as implied warrandice firſt in poſſeſſion: They were titles to force production of all infeftments, whether public or private; they excluded poſterior arreſters; they excluded the terce of the granter's relict, and were good in competition with poſterior gratuitous rights flowing from the ſame author; (*see* Stair, l. 2. t. 3. § 27. Bell *contra* Rutherford, No 2. p. 1260.; Spottiſwood, *voce* KIRKMEN.) All this is plain from the expreſs words of the act 1540, which firſt introduced the diſtinction of baſe infeftments, clad or not clad with poſſeſſion: That act preſumed, and ſtatuted upon the preſumption, that whoever took a baſe infeftment, and allowed the granter to retain poſſeſſion, did the ſame *ex fraude* to induce a ſecond purchaſer to give a price for the lands; and therefore ſtatutes, 'That perſons having ſuch baſe infeftments, ſhall not be heard againſt a ſecond 'heritable poſſeſſor, by any title which implies warranty.' This is all the act provides, or needed to provide, there being no place for ſuch preſumption of fraud in the caſe of a poſterior gratuitous infeftment. But 2*do*, Baſe infeftments, not clad with poſſeſſion, were always good againſt the heir of the granter, by an expreſs clauſe in the ſame ſtatute 1540. Suppoſe then John Lord Cochran had ſerved heir to his grandfather Earl William, he could not have quarrelled the infeftment; but he was in the ſame caſe as if ſerved heir, being liable *præceptione hæreditatis*, by accepting the diſpoſition 1680, to fulfil his grandfather's anterior deeds. 3*tio*, This baſe infeftment was a good right in the perſon of William Lord Cochran, even in competition with any poſterior, however onerous right, flowing from the granter; in as much as the granter having reſerved his liferent, the liferenter's poſſeſſion was, in the eye of the law, the poſſeſſion of the fiar.

Replied to this laſt article: The Lords have found, on the contrary, 'That an 'infeftment by a father to his ſon, was not clad with poſſeſſion by the father's 'poſſeſſion, although he had a factory from his ſon, Gardiner *contra* Colvil, '(*infra h. t.*)' And however it might be pretended, that if a third party ſhould denude in favour of one in liferent, and another in fee, upon which deed a baſe infeftment followed, that in ſuch a caſe the poſſeſſion of the liferenter would clothe the whole baſe infeftment with poſſeſſion, becauſe the liferent and fee are one and the ſame right, originally conſtituted by one infeftment; and becauſe the liferenter had no other infeftment in him, every perſon inquiring into the liferenter's poſſeſſion, could aſcribe it to no other title than that infeftment: It is quite another thing, where a father is infeft in the property, then infefts his ſon in fee, with a reſervation of his own liferent, and continues his own poſſeſſion: For there his poſſeſſion is not by virtue of his ſon's infeftment, but by virtue of his own right, which he hath reſerved in ſo far as concerns his own liferent

and poſſeſſion; and ſo that poſſeſſion of the father does not lead any perſon to find out the infeftment of the ſon: Having ſeen the father originally infeft in fee, they naturally aſcribe his title to that, and enquire no further. But indeed the matter in this caſe does not principally hang upon a *bona fides:* It is the nature of the thing determines the queſtion; where a father reſerves his liferent, his ſon's infeftment is not at all his. No 3.

It was *pleaded* for the Marquis in the *third* place, againſt this concluſion of the declarator, That the rights made to William Lord Cochran, by his father, were not fully completed, no public infeftment, but a baſe ſaſine only without poſſeſſion had followed upon them; beſides, that the Earl had not fully acquired in the rights to the eſtate in his own perſon: And therefore ſince the *dominium directum*, yea in effect the whole real right remained with Earl William the granter, and that John Lord Cochran was himſelf the heir, and only perſon to whom the right of theſe baſe infeftments could devolve, and who could complete theſe titles, or take up the poſſeſſion by virtue of them; it was optional to him, either to connect a right to theſe titles, and to inſiſt againſt his grandfather to complete them, or to neglect thoſe titles which remained ſo lame and incompleted, and to take a ſplit-new right from his grandfather, in whom the radical right ſtill continued: And ſince he choſe to do ſo, and did complete that new right by a public infeftment, no other heir coming after can ſet up theſe defective titles, in oppoſition to the new right 1680; which being granted, as ſaid is, to the ſame perſon who was heir to theſe incompleted lame titles, did entirely abſorb, and render them uſeleſs. And although this reaſoning muſt hold abſolutely, had the infeftments 1653 and 1656 both been completed *in ſuo genere*; it holds much ſtronger with regard to the lands now in queſtion, lying in the ſhire of Renfrew, that are contained in the deed 1653; becauſe the ſaſine upon that deed was not regiſtered in the regiſter appointed for the ſhire of Renfrew, but only in the ſhire of Ayr, within which other lands lie, not now in diſpute. The analogy of the deciſions of the Lords goes a great deal further upon this point: They have ſuſtained a wife's right to a terce, and a huſband's right to the courteſy, where the huſband or wife were inſeft upon a void title; upon this very foundation, That though the infeftment might be quarrellable, the huſband or wife, as they were heirs to the bad infeftment, were heirs to the good; and though they poſſeſſed by virtue of the moſt lame, no heir could quarrel, becauſe they might have taken up the good one; and it was the ſame by which they poſſeſſed, ſince the line of deſcent was one and the ſame in both. 2*do*, They have found that an apparent heir of an inveſtiture might diſcharge the reverſion of an appriſing, ſo as to bar any after heir from quarrelling. Theſe things were determined lately in the caſes of Linton *contra* Blair*, and Mader *contra* Mader*. There is another caſe better known, and that is the caſe of the eſtate of Kincardine, *infra h. t.*: That eſtate was ſold for the debts of Earl Alexander, upon whoſe titles the right of the purchaſer and ſo many creditors ſtands; Earl Alexander's title was not by ſervice to his predeceſſors, but by an appriſing led againſt his elder

* * *See* HEIR APPARENT.

No 3. brother Edward, the undoubted proprietor; which appriſing was liable to many objections; the grounds of it were loſt, itſelf ſatisfied by intromiſſion, numberleſs nullities in it: Yet, ſince Earl Alexander had acquired it, and made it the title of his poſſeſſion, when at the ſame time he was the apparent heir of the inveſtiture, the Lords would not allow Earl Alexander's ſon to paſs by that right, or to take up the right of Earl Edward his uncle againſt it. But the preſent caſe is ſtronger than all theſe: Thoſe titles were ſomewhat inconſiſtent with, and at beſt but collateral one to another. Here was only a lame title, which required a new deed of Earl William to complete it: It belonged to his grandſon; and accordingly, without putting him to any trouble, he fully completed the right: Where is the defect in ſuch a caſe? And here it may be further obſerved, that the conveyance in the 1680 being granted to the heir in thoſe deeds 1653 and 1656, in purſuance of the obligations contained in theſe very deeds, the diſpoſition itſelf granted to John Lord Cochran the grandchild, was of equal ſtrength with, and did import a precept of *clare conſtat*, when it proceeded from the ſame perſon by whom ſuch a precept fell to be given. Neither doth this import any defect in our records: Every body that looks into them muſt ſee, that the firſt infeftments were but baſe, flowed from Earl William, and by courſe did deſcend to John Lord Cochran; and conſequently that the completing the titles, by the ſame Earl, in the Lord Cochran's perſon, which they likewiſe ſee in the records, was agreeable to, and no more than a full implement of the firſt deeds.

To which the Earl made this *anſwer*, It cannot be pleaded, that the Earl of Dundonald's reſignation in favour of his grandchild, does convey what was not in the reſigner's perſon, but in the perſon of his ſon, and after his death, *in hæreditate jacente* of him. Neither does it in the leaſt alter the caſe, that the ſuperior's reſignation in the preſent queſtion, was in favour of the apparent heir of the vaſſal: For the apparent heir's taking infeftment on that ſurrender, gave him no more right to the property, than if made to a ſtranger; he became thereby ſuperior it is true, but remained ſtill but apparent heir as to the property: There was ſomething more to be done to make a title to the property, he muſt thereafter have ſerved, and infeft himſelf as heir to the vaſſal; or perhaps he might have done it, on a precept of *clare conſtat* granted by himſelf in his own favour; but without ſuch infeftment, the property remained *in hæreditate* of William Lord Cochran the laſt vaſſal, to be taken up by his next apparent heir, who is the preſent Earl of Dundonald. Nor are the known and fixed forms of tranſmiſſion of property, whether *inter vivos*, or from the dead to the living, ambulatory and precarious, to be obſerved or not, as one pleaſes: They have their foundation on principles firmly ſettled, 'that property cannot be conveyed but by 'infeftment, nor one infeftment tranſmitted but by another.' Neither does it make the leaſt difference, though the baſe infeftment had not been clad with poſſeſſion; ſtill it was a right in the perſon of a deceaſed anceſtor, whereof he was never diveſted; it remains therefore *in hæreditate*, till an heir ſhall make up a title to it. Nor is the want of regiſtration a ſolid objection; becauſe it is

not a nullity, but ſolely a ground of preference in a competition: Infeftments are notwithſtanding real rights, and produce all actions which ariſe from real rights, though they may be defeated in a competition. *See* March 25. 1623, L. Dunipace *; March 24. 1626, Gray †; June 12. 1673, Faa *contra* L. of Pourie and L. Balmerinoch ‡. 2*do*, They are always good againſt the granter and his heirs, which of itſelf is enough in this caſe: And the Lords found, 30th June 1705, Keith of Ludquhairn *contra* Sinclair of Diren §, 'That the aſſignee of an heir, who 'had ſerved to his anceſtor infeft only by an unregiſtrate ſaſine, was preferable 'to a ſubſequent heir, making up his title to his anceſtor laſt infeft by ſaſine on 'record.' It might be noticed, in the *third* place, That in ſome reſpects this argument is yet weaker than the former, of its being a baſe infeftment not clad with poſſeſſion: For there was nothing to hinder John Lord Cochran to have regiſtered his father's infeftment by warrant of the Lords, by which it had been as unexceptionable, as if regiſtered within ſixty days of its date, excepting only as to intervening competing rights: *Stair tit. compet.* § 22. But now admitting that William Lord Cochran's baſe infeftments had been void, as either not clad with poſſeſſion, or not recorded; nay, admitting there had been no infeftment at all, but only a naked perſonal diſpoſition in the perſon of William Lord Cochran, yet ſtill unleſs a title had been made up to that perſonal diſpoſition by ſome of the preceding apparent heirs, the preſent Earl muſt have the only title to that diſpoſition, and lands thereby conveyed, notwithſtanding the poſterior gratuitous infeftment flowing to John Lord Cochran from his grandfather the ſuperior. If the law ſtood otherwiſe, and that even a perſonal right could be paſſed over by the heir; or which is the caſe in hand, if John Lord Cochran could by law paſs over his father's right, and complete a title in himſelf without noticing it; Then it is certain, that the acquiring a new right from his grandfather was no paſſive title to his father; ſo was our law before the ſtatute 1695, and ſo is it ſtill, if the heir paſt by has not been three years in poſſeſſion: What then ſhould have become of his father's onerous creditors? If his right was ſopited by the new right taken from the grandfather, they were undone; for the acquirer was liable in no paſſive title, and yet the right was carried out of the perſon of their debtor: A plain conſequence, if the law ſtood as the Marquis pleads it. But this the juſtice of the law would never ſuffer: For though the acquirer was not *paſsive* liable, he could be charged by his father's creditors to enter heir to him; and upon his renunciation, the diſpoſition to the father could be adjudged. Is not that then a demonſtration, that the ſurrender by his grandfather did not tranſmit his father's diſpoſition? And if it did not, what can hinder the preſent Earl, who is the heir in that right, to take it up? It will not hold what is pleaded in the *laſt* place, That the diſpoſition 1680 is virtually a *clare conſtat*. *Id agitur* by a precept of *clare conſtat* to tranſfer the infeftment of the anceſtor; it is an infeftment given to the receiver *qua* heir; the direct contrary *agebatur* by the ſurrender 1680, *viz.* to give a new right, as if no ſuch infeftment had ever been: It cannot then be equal to a precept of *clare conſtat*, when in effect, though in other words, it

No 3.

* Durie, p. 61. *voce* REGISTRATION.
† No 1. p. 563.
‡ Stair, v. 2. p. 187. *voce* NON-ENTRY.
§ Forbes, p. 22. *voce* REGISTRATION.

No 3. bears, that *clare constat* there was no right in the perſon of William Lord Cochran at all. And it may further be obſerved, there is no right given to John Lord Cochran by his grandfather, but what might have been given even in his father's lifetime; which therefore could never be a habile method of making up a title to the rights that were in his father's perſon.

'THE LORDS found, That the procuratory of reſignation 1680, and charter 'and ſaſine following thereon, in favour of John Lord Cochran, joined with the 'ſubſequent infeftments and poſſeſſion of his heirs, did not effectually eſtabliſh, in 'the perſon of the laſt John Earl of Dundonald, granter of the bond of tailzie 1716, 'the property of the lands and eſtate wherein William Lord Cochran, ſon to the 'firſt Earl of Dundonald, died veſt and ſeiſed by either public or baſe infeft-'ments: And repelled the allegeance of preſcription pleaded for the Marquis of 'Clydeſdale, and alſo the allegeance of not regiſtration of William Lord Coch-'ran's ſaſine 1653 in the regiſter for the ſhire of Renfrew, and that the infeft-'ments 1653 and 1656 were not clad with poſſeſſion: And found therefore, that 'the lands and eſtate wherein William Lord Cochran died veſt and ſeiſed, and 'to which no title was made up by his ſucceſſors, by ſervice, precept of *clare* '*constat* as heirs to him, or by diſpoſition from him, are yet *in hæreditate jacente* 'of the ſaid William Lord Cochran; and that the preſent Earl of Dundonald 'may ſerve heir to him, in ſuch of the ſaid lands and eſtate as are ſettled upon 'heirs-male.' *See* PRESCRIPTION. *See* SERVICE and CONFIRMATION.

BRANCH V.

Apparent Heir, three years in poſſeſſion.

THERE was a ſeparate point *inſisted* on for the Marquis, ariſing from the act 1695, by which an apparent heir, paſſing by another heir who had been three years in poſſeſſion, is obliged to fulfil the deeds of that heir whom he paſſes by: Whence the Marquis *inſisted*, That allowing the Earl of Dundonald to be apparent heir to William Lord Cochran, and that he can connect his title by a ſervice; he muſt implement the deeds of the heirs who have been interjected between him and the ſaid Lord Cochran, particularly the bond of entail 1716.

In anſwer to this it was *contended*, That the act of Parliament, ſubjecting the heir paſſing by to the debts and deeds of the intermediate apparent heirs, does not extend to *gratuitous* bonds of entail, or deſtinations of ſucceſſion, made by ſuch intermediate apparent heirs, and that it does by no means concern diſputes among the ſeveral heirs, but ſingly ſuch as ariſe between heirs and creditors; as is evident from the whole contexture and ſtrain of the ſtatute, eſpecially when compared with the genius of our former law. It is inſcribed in the Rubrick, an act 'for obviating the frauds of apparent heirs:' It proceeds upon the preamble 'of the frequent frauds and diſappointments that creditors ſuffer upon the de-'ceaſe of their debtors, and through the contrivance of apparent heirs to their 'prejudice;' and for remeid thereof, ſtatutes, &c. Here is the abuſe intended to be redreſſed, viz. 'the frauds done to creditors upon the deceaſe of their

'debtors;' and the ſtatute ought not to be further extended, than in favour of thoſe who were creditors to the deceaſed apparent heirs. The argument for the Marquis is laid ſingly upon the generality of the words *debts and deeds*. But as this is an extraordinary ſtatute, contrary to the genius and analogy of all law, 'That one can by his debts or deeds affect a ſubject to which he has no title;' though ſo far as it goes, it muſt be binding, this much ought to be granted, that it is not to be extended. For this reaſon it has juſtly been made a queſtion, if, under the word *deeds*, direct conveyances were at all comprehended: And it is believed the late deciſion in the caſe of Muirhead of Drumpark,* was the firſt where it was ſo found: But then it proceeded upon this ſpecial ground, that being in a marriage ſettlement, it was an onerous deed: It was a *debt* on the granter, implying warrandice; wherefore the Lords thought ſuch deeds fell under the reaſon of the law. It is material to obſerve, that the law requires a poſſeſſion for three years by the intermediate heir, in order to make the heir *paſſing by* liable for theſe *debts* and *deeds*: The reaſon whereof can be no other than this, that *bona fide* contractors, by ſeeing a man ſo long in poſſeſſion, were induced to believe he had completed his title to the eſtate: For had the intention been, to enable him, even while he had no title, to alienate the eſtate gratuitouſly, by a naked deſtination of ſucceſſion, in prejudice of the next heir; what reaſon had there been for requiring a three years poſſeſſion to capacitate him for this end? Would not the poſſeſſion of one day have been as good as the poſſeſſion of a year, if it had been in the intention of the ſtatute at one blow to overturn the firmeſt foundations of our law?

No 3.

'THE LORDS found, That the Earl of Dundonald, by ſerving heir to William Lord Cochran, and paſſing by Earl John, maker of the gratuitous bond of tailzie 1716, is not by the act of Parliament 1695 obliged to fulfil the ſaid bond of tailzie.' *See* HEIR APPARENT. *See* PASSIVE TITLE.

BRANCH VI.

A Perſon paſſing by an Apparent Heir, three years in Poſſeſſion, and liable for his Debts, has recourſe againſt his Repreſentatives in any other Subject.

January 1727.

THIS queſtion came afterwards to be debated betwixt the parties, Whether the preſent Earl of Dundonald, who enjoys the old eſtate as heir to William Lord Cochran his grand-father, who died laſt veſt and ſeiſed therein, paſſing by the ſeveral intermediate Earls of Dundonald, who never made up the proper titles to that eſtate, but one after another poſſeſſed as apparent heirs of William Lord Cochran, ſhall, upon the act of Parliament 1695, be bound to pay the perſonal debts contracted by the ſaid apparent heirs, without relief againſt the Marquis their repreſentative, who as heir to them enjoys their proper eſtate?

And it was *contended* for the Marquis, That he is only heir of proviſion in virtue of the deed 1716, and as ſuch liable for the debts only in the laſt place, after diſcuſſing of other heirs; and that he has relief off theſe other heirs, and ſuch

* *See* PASSIVE TITLE.

No. 3. as in the conſtruction of law are liable as other heirs; which is the Earl of Dundonald's caſe in conſequence of the act 1695.

Anſwered, The act 1695 was introduced allenarly for the ſecurity of creditors, and to prevent their being diſappointed of their money, where they contracted upon the faith of the apparent heir their debtor's being three years in poſſeſſion; but by no means in favour of an heir, ſo as to give him relief of any debts to which he is liable *qua* heir ſerved; nay it might even be thought a queſtion, 'If the creditor himſelf could have any benefit from the act, in ſuch a caſe 'where the debtor hath an heir ſerved, on whom an eſtate hath devolved ſufficient for payment of his debt.' But be in that what will, it is enough to ſay, that the act of Parliament introduced only an acceſſory ſecurity for the creditors, and from a principle of equity made an eſtate, which really was not the debtor's, liable to his debt, becauſe of his poſſeſſion, and the *bona fides* of the creditor: But if the perſon to whom the eſtate truly belonged made the creditor ſecure, by paying him his money, there was nothing in law to hinder him to have his recourſe againſt the proper heir of the debtor, either for relief, or by taking aſſignation, and inſiſting in name of the creditor.

'THE LORDS found the Marquis of Clydeſdale obliged to relieve the Earl of Dundonald.' *See* HEIR APPARENT. *See* VIRTUAL. *See* PASSIVE TITLE.

Fol. Dic. v. 1. *p.* 87. *Rem. Dec. v.* 1. *No* 70. *p.* 138.

*** *See* Roſs againſt Elliot, Durie, p. 491. *voce* PROOF. *See* Auchinleck againſt Cathcart, Durie, p. 647. *voce* OBLIGATION.

SECT. II.

Baſe Infeftments are preferred to one another, and to Public Ones, according to date, if ſteps have been taken, *ſine mora*, to attain Poſſeſſion.

No 4. A baſe infeftment preferred to a public one, as being in date prior; the baſe infefter having, *ſine mora*, proceeded in diligence to render his right public.

1624. *February* 13. A. *againſt* B.

IN an action for poinding of the ground of a tenement of land, which was holden of the Baron of Burghton, conform to an infeftment of an annualrent, granted to the purſuer by the heritor of the tenement, to be holden of the granter; after the which infeftment of annualrent, the heritor of the land, granter thereof, reſigned the lands in the ſuperior's hands for infeftment heritably, to be given thereof to the defender, and who upon the ſuperior's precept was infeft; and by virtue of this public infeftment the defender compeared, and would have excluded the purſuer's action, founded upon the baſe infeftment; to the which he *alleged* he ſhould be preferred, in reſpect of the act of Parliament, ſeeing that conform to his public infeftment, he alleged he had acquired a year's poſſeſſion of the land. This allegeance was repelled, and the baſe infeftment of the annualrent preferred to the public infeftment of the property, becauſe it was no